No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF *AMICUS CURIAE* OF NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION IN OPPOSITION TO PETITION

JOSEPH M. RYAN
JOHN R. CASOLARO
SUSAN B. KALIB*
JACK KAPLAN
CARTER LEDYARD
& MILBURN LLP
2 Wall Street
New York, New York 10005
(212) 732-3200

* *Counsel of Record*

Attorneys for Amicus Curiae

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INTEREST OF THE AMICUS

New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") respectfully submits this brief as an *amicus curiae*.[1] ESDC is a public benefit corporation and political subdivision of the State of New York, created by the New York State Legislature in 1968.

ESDC's primary public purpose is to foster economic revitalization by creating employment, increasing state and local tax revenues, constructing viable commercial, industrial and residential development, and contributing to urban stabilization and revitalization.

One of ESDC's most important economic revitalization tools is its power of eminent domain. Compensated takings are essential to the assembly of diversely-owned parcels for large-

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[1] This brief is filed with the written consent of all parties; the requisite consent letters have been filed with the Clerk. No part of this brief was authored by counsel for any party, and no person or entity other than ESDC or its counsel made a monetary contribution to the preparation or submission of the brief.

scale economic revitalization projects, particularly in urban areas, which are densely layered with public infrastructure and often competing private interests.

At issue on this appeal is whether the Court should disturb the considered decision of the court below that the use of eminent domain for the purpose of economic revitalization, as determined by local conditions and public needs, will serve a public use. ESDC is vitally interested in continuing to undertake projects in New York which revitalize its economy and promote an optimally functioning society, particularly in a post-industrial age and in an increasingly global competitive economy. Accordingly, ESDC urges this Court to affirm the decision below.

SUMMARY OF ARGUMENT

Throughout American history, states have used eminent domain to take non-blighted properties for economic development projects. This Court should not disturb those precedents.

ARGUMENT

ORIGIN AND EARLY HISTORIC USE OF EMINENT DOMAIN

The concept of government appropriation of private property for public use has ancient origins and has evolved with changing times, conditions and technologies. In 1625, Hugo Grotius coined the term "eminent domain" to refer to what he called the government's "inherent power" to use private property for public advantage, where the owner of such property is compensated at public expense. Matthew Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245, 1249 (2002).

As early as 1421, the English Parliament authorized the taking of privately-owned property for the purpose of repairing roads and bridges. *Id.* at 1260. During the 16th Century, Parliament authorized compensated takings for the development of public water and navigation systems. *Id.* at 1261. A 1514 statute authorized the City of Canterbury to improve a river, but required that compensation be paid to anyone whose mill, bridge or dam was removed. Errol E. Meidinger, *The "Public*

Uses" of Eminent Domain: History and Policy, 11 ENVTL. L. 1, 12 (1980-81).

FOR CENTURIES, THE POWER OF EMINENT DOMAIN HAS BEEN USED IN THE UNITED STATES FOR INDUSTRIAL AND COMMERCIAL DEVELOPMENT

Since colonial times, it has been recognized that the power of eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." *Boom v. Patterson,* 98 U.S. 403, 406 (1879). Indeed, eminent domain is "the most ancient of sovereign prerogatives ... a power which antedates our State and Federal Constitutions...." *Fifth Avenue Coach Lines, Inc. v. City of New York,* 11 N.Y.2d 342, 229 N.Y.S.2d 400 (1962).

From pre-constitutional times to the present, the history of compensated takings tells a fascinating story about its application in an ever-evolving economy. Before the Constitution, the power of eminent domain was used by the colonies to promote industrial development, with early uses including the building of mills. Harrington, at 1300. From 1667, landowners

directly benefited from the use of eminent domain by virtue of the so-called Mill Acts. These acts allowed "downstream riparian owners to dam streams and condemn the flooded property of upstream owners, rather than negotiate for the rights or be subject to traditional nuisance remedies." Meidinger at 15.

The Maryland Mill Act of 1669 authorized the taking of private land for use as a watermill to be operated by a private owner. John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property,* 39 AM. J. LEGAL HIST. 1 (Jan. 1995). That Act was the Maryland legislature's effort to diversify the local economy, which suffered intermittent gluts of its chief cash crop, tobacco. *Id.* at 3. The goals of the act were to increase trade and stimulate local industries, all for the primary benefit of the general public, even if specific private enterprises garnered secondary short-term economic gain. *Id.* at 5

Pointing to the numerous Mill Acts, scholars have observed that "the founding generation approved the constitution-

ality of takings that did not vest the entire public with rights of use, but only produced an indirect benefit to the public." Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement,* 49 DUKE L. J. 339, 374 (1999) (citing Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L. J. 599, 605 (1949) ("No clearer instance of a taking of property for the benefit of private individuals could be presented, and literal application of the 'use by the public' test would seemingly require invalidation."); *See also,* Lawrence Berger, *The Public Use Requirement in Eminent Domain,* 57 Or. L. Rev. 203, 206-07 (1978) ("Arguing that the Mill Acts signal 'the early acceptance of the broad view that it was the great advantage to the public which justified the taking, even though a private individual undoubtedly received a substantial and perhaps greater benefit, and even though the public had no right to use the property.'")). In 1816, the Virginia Supreme Court concurred with this view, upholding the state's Mill Act and identifying

the public purpose as the benefit to the community conferred by productive mills. Sales at 374; *Skipwith v. Young,* 19 Va. 276 (1816).

Shortly after the American Revolution, the power of eminent domain was also used for the construction of dams for mills, and the flooding of lands for harnessing water power:

> Both [roads and flooding lands for water power] were of course closely linked to economic development. Roads were essential to opening up the ever-expanding interior [of the United States] and exploiting its resources...Ready water was equally critical to the development and implementation of new industrial technologies.

Meidinger at 18, 23.

During the 1800's, the Mill Acts were expanded to a variety of new, privately-owned manufacturing industries. *Id.* at 23. In 1832, landowners challenged New Jersey's act authorizing takings to allow a private corporation to build 70 factory mills along the Delaware River. *Scudder v. Trenton Delaware Falls Co.,* 1 N.J. Eq. 694 (N.J. 1832). The court rejected the

landowners' claim that the taking was for private rather than public use after examining

> the objects, the purposes, and the results of the undertaking ... The water power about to be created, will be sufficient for the erection of seventy mills, and factories, and other work dependent on such power. ... It will be no experiment in a country like ours; and, judging from the results in other places, we may make a sufficiently accurate calculation as to the results here. Take the town of Paterson as an example. The water power there is in the hands of individuals--a company like this. They are under no obligation to lease or sell any mills or privileges to the public; and yet see the result of a few years' operation. **Paterson is now the manufacturing emporium of the state** .... It has increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind. May we not hope that a similar benefit may be experienced here?
>
> * * *
>
> The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being.

Id. at 728-29 (emphasis supplied).

That same year, the Massachusetts Supreme Court upheld a similar statute and other states followed suit, all holding that takings "which contributed to the *overall benefit* of the community met the public use test." Meidinger at 24; *Boston and Roxbury Mill Corp. v. Newman,* 29 Mass. 467 (1832). In *Roxbury,* the Massachusetts legislature gave a mill corporation the right to use landowners' private property for the purpose of working its mills. Referring to the old mill statutes, the court noted that mills are described as greatly beneficial to the public and, if the mills become inoperable, the public good will be harmed. *Id.* at 478.

At issue in *Roxbury* was whether the taking of the landowner's property for use by a private enterprise to operate its mills was unconstitutional. The landowner sought to distinguish the taking of his property for the mills with the taking of property to build turnpike roads by asserting that the public has a right to use the roads by paying a toll, whereas the public does not have the right to use the mill factories. The court disagreed:

> [I]n regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? And are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and to that kind of employment, is prevented from its exercise? This becomes a matter of interest, which will certainly direct and govern the parties. And it is among the most pleasant considerations attending this branch of the subject, that the interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works.

Id. at 477.

Upholding a Mill Act which benefited a private company, New Hampshire's highest court held that the concept of public use depends on local industry and the natural resources of the state. *Great Falls Manufacturing Co. v. Fernald,* 47 N.H. 444, 460 (1867). The court explained :

> The public use may have relation to any purpose ... which subserves the general interest. The only test and criterion of the admissibility of the power are that the particular object tends to promote the general interest in its relation to any legitimate objects of government.... [T]he use is to be regarded as public, if a general public benefit results from it.'

Id. at 456 (citations omitted).

Beginning in 1817 and despite vehement public ridicule and protestations of economic infeasibility, New York State willingly paid to take non-blighted private property to permit the construction of the Erie Canal, as approved by its Legislature, a taking which even antedated the Takings Clause in New York State's Constitution. The purpose of the then highly speculative project (dubbed "Clinton's Folly" after Governor DeWitt Clinton) was, in part, "to promote agriculture, manufactures and commerce" and, in the words of the Governor, to transform the City of New York into "the granary of the world, the emporium of commerce, the seat of manufactures, the focus of great moneyed operations."[2] The Canal established a trading

[2] 40 N.Y. Sess. Laws. Ch. 262 (1817); New York State Canal Corporation, *The Erie Canal, A Brief History,* http://www.canals.state.ny.us/cculture/history (updated June 29, 2004).

route to the Midwest, operated by private carriers, which expanded the Nation's economy, creating jobs and public wealth along the way. *See* Meidinger, at 26, n. 91; *Rogers v. Bradshaw*, 20 Johns. 735, 738-39 (N.Y. Ct. of Errors 1823). The Canal was also an avenue for social reforms, such as women's rights and the abolition of slavery.[3]

During the late 1800's, eminent domain spurred industrial growth in other States, even in non-blighted areas. Private property was taken to enable miners to develop transport facilities. Meidinger at 28. Colorado's constitution still permits takings for "private ways of necessity, ... reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes." COLO. CONST. Article II, §14. Idaho's constitution deems mining and irrigation to be public uses, as well as "any other use necessary

[3] *See* Parks and Trails New York, http://www.ptny.org/canalway/history.shtml.

to the complete development of the material resources of the state." IDAHO CONST., Article I, §14. New Mexico permits any person to exercise condemnation for "the conveyance of water for beneficial uses". N.M. Ann. Stat. § 72-1-5 *See Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P. 2d 986 (1970).

As the 20th Century progressed, public needs changed. Worn infrastructure and advancing technologies required new strategies. Massachusetts, for example, amended its constitution to provide: "The industrial development of cities and towns is a public function...." MASS. CONST., Article LXXXVIII (Amended 1966).[4]

[4] See *also, Opinion of the Justices to the Governor*, 369 N.E.2d 447, 373 Mass. 904 (1977) ("Reducing unemployment and stimulating the economy are public purposes."); MASS. CONST., Article LXXXVIII).

THE ORIGINAL WORLD TRADE CENTER

In 1962, New York and New Jersey authorized an ambitious project known as the "World Trade Center." The World Trade Center enabling legislation provides for a:

> facility of commerce ... for the centralized accommodation of functions, activities and services for or incidental to the transportation of persons, the exchange, buying, selling and transportation of commodities and other property in world trade and commerce....

Chapter 209 of the Laws of New York 1962, N.Y. Unconsol. Laws §6601, *et seq.* (1964).

To effectuate the project, the Port of New York Authority (the "Port Authority"), a bi-state authority, in its effort to assemble 143 parcels with diverse ownership, undertook to condemn properties in Lower Manhattan. Landowners opposing the condemnation sought a declaration that the enabling statute was unconstitutional. As with the Erie Canal, naysayers abounded.

The Port Authority's brief to the New York Court of Appeals discussed the then recent loss of import-export trade in

New York, threatening the Port of New York's status as the leader in international trade. (A 2-4).[5] The Port Authority cautioned:

> Such a threat imperils the economy of the whole region since one out of every four persons in the area is dependent for his livelihood directly or indirectly on Port activities....[T]he New York Port cannot hold its own in the vigorous competition with other ports unless it can offset the disadvantages by continuing its leadership in the back-up services which has been one of its major special advantages. The World Trade Center was proposed and authorized to reverse the trend of the Port's decline by attracting more shipping.

(A 1).

The purpose of the World Trade Center project was to:

> restore the vitality and growth of our declining Port and thus preserve the economy of the New York metropolitan area. The technique to be used is the centralization and coordination in a single location of the many scattered governmental agencies and private organizations which must work together to administer the

[5] References to ESDC's Appendix are cited as "A __".

> movement of world trade through the bi-State Port.

(A 3).

Thus, "[t]he World Trade Center, as a facility intended to provide a permanent benefit to the entire economy and not just a temporary stimulus and edification, presents an *a fortiori* example of a public purpose." (A 22).

The New York Court of Appeals upheld the validity of the enabling statute, holding that "facilitating the flow of commerce and centralizing all activity incident thereto is a public purpose supporting the condemnation of property for any activity functionally related to that purpose." *Courtesy Sandwich Shop, Inc. v. Port of New York Authority,* 12 N.Y.2d 379, 389, 240 N.Y.S.2d 1, 6 (N.Y. 1963), *appeal dismissed* 375 U.S. 78 (1963) (for want of a substantial federal question), *rehearing den.* 375 U.S. 960.

The court's opinion described the concept of the World Trade Center as:

> the gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York.

12 N.Y.2d at 389, 240 N.Y.S.2d at 6.

The court also observed:

> Even the centralization of inland trade has supported the exercise of the power of eminent domain for the establishment of public markets wherein private merchants plied their trades.

12 N.Y.2d at 389, 240 N.Y.S.2d at 6.

In the years that followed, the office complex constituting the World Trade Center became a world symbol of America, particularly as New York City reinforced its position as the capital of international trade and commerce. The secondary benefits to the private entities who participated in the project paled in comparison to the enormous primary public benefit to the entire metropolitan region.

In 2001, terrorist attacks destroyed all seven office buildings comprising the World Trade Center. New York, with

the assistance of Congress, has undertaken a massive rebuilding project. As a first step, ESDC recently used its power of eminent domain to permit the expedited rebuilding of 7 World Trade Center, the first building to be rebuilt. Not only will that rebuilding restore the City's economy and spirits, it will also secondarily assist the privately owned lessee thereof.

Today, ESDC's subsidiary, Lower Manhattan Development Corporation ("LMDC"), is charged with assisting New York City in recovering from the 2001 terrorist attacks and ensuring that Lower Manhattan continues as a strong, 21st century central business district. LMDC contemplates the use of eminent domain in furtherance of the project.

RECENT ESDC PROJECTS

A. Revitalization of Times Square

Beginning in 1980 and continuing through 2002, ESDC successfully revitalized approximately 13 acres of land in the Times Square area of Manhattan. The project was developed in response to decades of rampant economic disinvestment in Times Square by the private sector.

As an example, ESDC recently condemned a large underutilized parcel to construct a 50-story plus building, which will produce an exponential increase in real estate taxes, income taxes, and sales taxes.

The project would have been inconceivable without eminent domain because the project site consisted of more than 60 separately owned, small and underutilized lots, and many of the owners refused to sell their properties except for exorbitant sums. Despite concerted efforts extending over generations, various private interests had been unable to assemble large enough parcels to revitalize the area. There were instances where even a "hold-up" price proved insufficient. Some owners had simply refused to sell at any price and thus thwarted assemblages which would benefit the commonweal. *See* Andrew Alpern, *New York's Architectural Holdouts* (1997) (Detailing numerous, insoluble and typical holdout problems throughout New York City despite the use of creative and sophisticated techniques). Condemnation permitted ESDC to as-

semble sustainable development sites permitting, to date, the construction by the private sector of six major office towers, two major hotels, and myriad retail opportunities of enormous benefit to all New Yorkers. No New York court deemed it a justiciable issue to undertake an independent economic risk analysis of the likely success of the project in determining if those compensated physical takings should proceed.

New York City and other large, densely populated, older American cities will be enormously disadvantaged if they are not permitted to use the power of eminent domain for the commonweal. Without ESDC's use of compensated takings to revitalize Times Square, low tax revenues and limited job opportunities would have persisted.[6] Now, despite private benefits, the predominant economic and social benefits have accrued to the public.

[6] As illustrated by the title to Columbia University's Lynne Sagalyn's *Times Square Roulette* (MIT Press 2001), there were risks. There were greater risks in doing nothing.

B. The New York Stock Exchange

In 2001, the New York State Legislature expressly authorized ESDC to use eminent domain to acquire non-blighted property in Lower Manhattan for the construction of a new, state-of-the-art securities trading facility for the New York Stock Exchange (the "NYSE").[7] *See* New York Stock Exchange Project, 2000 N.Y. Laws Chpt. 590.

The purpose of the project was to retain the NYSE in the City. The NYSE faced limitations on its ability to expand and incorporate critical technological upgrades at its existing facility and its fragmented operations threatened its future ability to function effectively in its existing location. The Legislature found that the loss or reduction of the NYSE would adversely impact the economic environment of the City and the State; that the maintenance and promotion of such markets pro-

[7] The use of eminent domain was necessary to obtain property from newly ensconced residential and commercial holdouts.

vides significant contributions to the taxing base of the State, to the economic development of related industries, and to job creation; and that the presence of such markets in the City enhances the credibility and prestige of the State and the City as a financial and commercial center worldwide.

This global marketplace is now as much an instrument of commerce as were the factory water mills of the 18th and 19th Centuries. New York has become "the focus of great moneyed operations" as envisioned by the 1817 legislation creating the Erie Canal. The importance of the securities industry in New York City is illustrated by the large number of firms and employees engaged in securities exchange, the substantial amount of office space occupied by these firms, and the volume of tax revenues generated by these firms, all of which generate economic benefits for the City, State and country.

ESDC contemplated the use of its eminent domain power to assemble the several complexly-owned parcels necessary for the creation of a large trading floor for the NYSE. Al-

though the state appellate court upheld the use of condemnation for the non-blighted NYSE project site, unfortunately, shortly before the decision issued, the 2001 terrorist attacks and the resulting drain on State and City resources meant that the project could not proceed. *In re Fisher,* 287 A.D.2d 262, 730 N.Y.S.2d 516 (1st Dep't 2001) (Upholding condemnation for economic development).

THE SUPREME COURT HAS HISTORICALLY DEFERRED PUBLIC USE DETERMINATIONS TO THE JUDGMENT OF THE LEGISLATURE

In 1923, this Court held that the determination of what constitutes a public use "is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 705-06 (1923). In *Rindge,* the Court focused on whether the taking was a legitimate exercise of the government's police power, thereby implicating the Fourteenth

Amendment's Due Process Clause, rather than the Takings Clause, which focuses solely on the issue of compensation.[8]

Three decades later, the Court rejected a challenge to the condemnation of a non-blighted parcel for the purpose of urban redevelopment in the District of Columbia. *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98 (1954). The Court made clear that:

> when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.... This principle admits of no exception merely because the power of eminent domain is involved.

[8] *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S. Ct. 1434, 1437 (1949) (In the context of compensation, Justice Frankfurter, writing for the majority, explained that given "the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."). This Court has never equated condemnees' subjective losses with unconstitutionality.

Berman, 348 U.S. at 33, 75 S. Ct. at 102. The Court defined "[t]he concept of public welfare [as] broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." 348 U.S. at 33, 75 S. Ct. at 102-03. It may include beautification and the creation of a healthy, spacious, clean, well-balanced and carefully patrolled area. 348 U.S. at 33, 75 S. Ct. at 102-03. As in *Rindge*, the *Berman* Court held that once the legislature is deemed to have the authority to carry out a project, "the right to realize it through the exercise of eminent domain is clear." 348 U.S. at 33, 75 S. Ct. at 103. "The question of whether a use is public is determined by looking at whether the government can legitimately exercise the police power in respect of that use, and that question cannot be answered by looking at the Takings Clause, as *Berman* makes clear." Edward J. Sullivan and Nicholas Cropp, *Sources of 'Public Use' Limitations -- Taking or Due Process*, ZONING AND PLANNING LAW REPORT (Sept. 30, 2004) at 3.

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984), the Court held with "no trouble" that a state's use of eminent domain is a "classic exercise" of its police powers and may be used to effect property transfers from oligopolist landowners to lessees in an effort to reduce inflated land prices. In so holding, the Court made clear that "the 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." Indeed, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the *Public Use Clause*." 467 U.S. at 241, 104 S. Ct. at 2329. *See also National Railroad Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422, 112 S. Ct. 1394, 1404 (1992) ("[T]he public use requirement of the Takings Clause is coterminous with the regulatory power....") In a compensated taking context, the *Midkiff* Court concluded that it would not substitute its judgment for that of the legislature "unless the use be palpably without reasonable foundation ... because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power...." 467 U.S. at 244, n. 7, 104 S. Ct. at 2331, n. 7.[9]

The holdings of these cases and the early 19th Century decisions discussed above should not be overturned. They were correct when they were decided and they are correct now.

CONCLUSION

Throughout the history of this country, compensated takings have been used to promote economic, commercial, and

[9] Petitioners and some *amici curiae* contend that there is a crisis in eminent domain law and that *Midkiff* must be overturned. This contention, however, is based upon an analysis of news and magazine articles by petitioners' counsel, the Institute for Justice. Such news articles are notoriously self-serving, frequently misstate facts, and are generated for strategic purposes. In 2003 and 2004, the Institute for Justice contributed to 46 news and magazine articles out of the 385 published on the subject of public use in condemnation. Dec. 29, 2004 Westlaw search of ALLNEWS database for ("Institute for Justice", "Public Use", or "Dana Berliner") and "Eminent Domain" in headline or lead paragraph.

industrial revitalization by maximizing local resources, assembling diversely-owned or landlocked parcels, and creating and sustaining employment opportunities, all for the primary benefit of the public. Consistent with the principles of federalism and judicial economy, this Court has always afforded due deference to the respective state legislatures' use of compensated takings for the purpose of economic revitalization as a legitimate exercise of their government's police powers. This Court has similarly deferred to state judiciaries in reviewing public use challenges to compensated physical takings. For centuries, what constitutes a permissible public use of eminent domain under the Constitution has been an elastic concept, reshaped to accommodate local conditions and ever-changing social and economic circumstances.

Amicus ESDC urges the Court to continue to permit local governments and states to use condemnation as a vital tool for the purpose of economic revitalization. Accordingly, ESDC

respectfully requests that the Court affirm the March 9, 2004 decision of the Supreme Court of Connecticut.

Dated: New York, New York
January 19, 2005

CARTER LEDYARD & MILBURN LLP

By: _____
Joseph M. Ryan
John R. Casolaro
Susan B. Kalib*
Jack Kaplan
2 Wall Street
New York, New York 10005
Tel. (212) 732-3200
Fax (212) 732-3232

*Counsel of Record

Attorneys for *Amicus Curiae*

Appendix

STATE OF NEW YORK
COURT OF APPEALS

Courtesy Sandwich Shop, Inc.
v.
The Port of New Authority

Excerpts from the brief of
Port Authority Appellants
(March 4, 1963)

* * *

With the Port of New York suffering a severe decline in its share of the Nation's import-export general cargo, a threat has grown to the Port's leadership. Such a threat imperils the economy of the whole region since one out of every four persons in the area is dependent for his livelihood directly or indirectly on Port activities....[T]he New York Port cannot hold its own in the vigorous competition with other ports unless it can offset the disadvantages by continuing its leadership in the back-up services which has been one of its major special advantages. The World Trade Center was proposed and authorized to

reverse the trend of the Port's decline by attracting more shipping.

* * *

POINT II

The purpose of the Legislatures in authorizing the World Trade Center is preservation of the status of the Port of New York. This constitutes a vital public purpose.

While the Appellate Division majority found the Act invalid for exceeding the World Trade Center concept, it found that "There is no question but that the creation of a world trade center, in concept, is a public purpose."

On oral argument Respondents' counsel was equivocal on this point. When asked by counsel whether he would concede that the World Trade Center concept represented a public use, he said "No." On his own argument, however, he expressly said "a world trade center can be a public use" but argued that a 72 story trade center building would necessarily represent a private real estate venture.

The World Trade Center has a simple, practical public

objective—liberating the New York Port's world trade from the waste, the costly delays, the inefficiencies which stem from the existing helter-skelter pattern of offices and agencies concerned with moving cargo through the Port. The purpose is, by curing these evils, to restore the vitality and growth of our declining Port and thus preserve the economy of the New York metropolitan area. The technique to be used is the centralization and coordination in a single location of the many scattered governmental agencies and private organizations which must work together to administer the movement of world trade through the bi-State Port.

(1) The decline of the Port of New York.

The Port of New York is not guaranteed leadership by any law of economics, science or nature. The Port has been the nation's principal gateway of trade with the rest of the world. But the east and gulf coasts offer many competitive gateways.

New York is a great metropolitan area because it has a great port. This is not a great port merely because it serves a

great metropolitan area.

Whereas ten years ago this Port handled about 33% of the nation's general cargo, today it handles only about 21%–the Port has suffered a major decline in its share of the Nation's general cargo, which is the kind of cargo which contributes most to a port's economic well-being.

The Port is only managing to hold on to the absolute tonnage it handled ten years ago. It has not enjoyed its share in the growth of foreign trade being generated by the country as a whole. The competitor ports have absorbed the growth almost entirely and our Port is suffering a decline in relative importance.

These are the basic concerns which culminated in the agreement of the two States embodied in the Act. The account we shall give in this brief of the reason for authorizing the World Trade Center and the exposition of what the World Trade Center concept truly is are paraphrases of the 1961 and 1962 Reports to the Legislatures.

(2) The critical importance of the Port to the economy.

In this Port District of New York and northern New Jersey, world trade is the very life blood of the local economy. It was reported to the Legislatures that direct port activities create 430,000 jobs in the Port District which pay over two billion dollars in wages each year. Each of these 430,000 jobs creates an economic condition in ancillary services equal to additional jobs for a total of 1.3 million jobs representing an annual pay check of over six billion dollars. Adding the job-holders' dependents produces the total of over three million persons and a ratio of one out of every four persons dependent directly or indirectly on the movement of international trade throughout the tri-State Port.

(3) Port development is traditionally a public responsibility.

In making their findings, the Legislatures and Governors were merely following views uniformly held by the Courts of this State since the end of the past century when they came to appraise the public importance of retaining and promoting the

commerce of the Port of New York. Compare Judge Andrews' statement in *Ferguson v. Ross*, 126 N.Y. 459, 465 (1891), where he said :

> "The citizens of New York city may possibly have a greater stake in the matter than citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state."

A year later, in *Matter of Mayor of the City of New York*, 135 N.Y. 253 (1892), this Court upheld the condemnation of land for wharves and piers as a taking for a public use though the City intended to lease them to private companies to the exclusion of all others. The Court said (p. 262):

> ". . . The state itself owed a duty to its own citizens to provide adequate means for the carrying on of the commerce which was sure to come to the one great seaport within its borders."

As stated in *Commissioner v. Ten Eyck*, 76 F. 2d 515, 517 (2nd Cir. 1935) :

> "Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people."

(4) The Port problem today.

We mentioned at the outset the freight rate discriminations and other factors making it impossible for the Port of New York to compete merely on the basis of freight costs.

How then has the Port of New York retained even its declining share of the Nation's world trade? The answer lies in the fact that our Port has generated many advantages which can counteract such disadvantages as we have listed. One of the principal offsetting advantages of the Port of New York has been the range and completeness of its Port services, particularly those services that *support* and *back up* the direct berthing, loading, unloading and haulage of cargo. These have given the American exporter or importer confidence that here at New York he will have available the public services, administrative help and the wide range of financial and marketing resources that are essential to the flow of world commerce.

Since the shipper will tend to use only that port which he believes will produce the lowest *net* cost to him, our Port can

maintain its position and reverse the trend against it only if we can continue to provide more and better back-up port services than the competing ports.

In past centuries a port might have been viewed as limited to wharves, docks, piers and other terminal facilities solely for the physical transit of cargo and passengers. But today it must be deemed to include the numerous and complicated governmental and administrative services necessary for their movement.

If at the Port of New York such shipping services are not adequate or efficient, the Port lacks modern and efficient port facilities, even though it might possess the finest piers, docks and wharves.

The States are at another crossroads such as confronted them in 1922 when Alfred E. Smith, as a Port Authority Commissioner recommending adoption of the Comprehensive Plan to implement the Port Compact he had sponsored as Governor, said:

> "We can sit here and talk engineering figures for a year. We can draw plans for five years, but if there isn't a healthy vigorous determination on the part of localities and organizations and people generally in the port district to make some change in the old-fashioned, worn-out, dilapidated ways of doing business in this port, the figures would amount to nothing." Bard, The Port of New York Authority (p. 47, 1942).

For decades the very size of the Port of New York generated the specialization and variety of services which permitted the Port not only to compete but to grow. But the growth of other ports in recent years, while we have remained static in our tonnage, is permitting them in ever increasing degree to match the advantages which have produced our premier position.

In other words, our Port is losing its ability to provide services which are *superior* as the ability of other ports to match our services has been increasing.

The other ports are missing no opportunity to capture trade from the Port of New York. There are today, in this, our own Port, offices of fifteen other United States ports, each of which conducts a competitive program aimed at diverting trade

from New York.

If New York stands still in what it offers as it tries to attract world trade, there is only one logical conclusion as to what the future holds. The Port will move from a period of holding its own to a period in which it will lose not only proportionately but absolutely much of its cargo to its competitors at an accelerating rate. The end must be that this Port will be reduced from the Nation's gateway to a mere local port, handling only cargo with local origins or destinations.

And so the Legislatures determined that if the Port of New York is to be successful in resisting the present erosion of its status, it cannot stand still. Even with the vitalized pier program conducted by the Port Authority and the City of New York, the decline of this Port's relative position has persisted. The danger of losing the superiority in services has grown. The result is increasing danger of the erosion of one of the major foundation stones on which the economy of the New York metropolitan region rests.

(5) The legislative remedy – The basic World Trade Center concept.

The Legislatures' approach is to capitalize on and increase the Port's leadership in back-up port services. Recognizing the waste, the costly delays and the inefficiences which stem from the haphazard distribution of port service offices and agencies in the bi-State Port, they have authorized the World Trade Center in an effort to remove these clogs by centralizing the world trade community of the Port.

Respondents chose to ignore the realities of world trade when they suggested in the Appellate Division that the legislative purpose is merely to effect "a small saving in messenger service between various offices". Let us analyze what is happening to the Port while this messenger is finding his way through the City's congested arteries from, let us say, the Custom House to a foreign consulate on upper Fifth Avenue. As he is held up in trying to feed the document he carries into the administrative processes of the foreign consulate, the cargo which the document describes can miss being loaded on a freighter or

the cargo may depart with invalid documentation causing financial penalty.

Multiply these example thousands of times and the immensity of the problem emerges.

The costs at which the Legislatures are aiming are not the piddling messenger costs which the Respondents deride. They are the prohibitive and cumulative costs which result from delays in the chain of administrative processing of 30,000,000 documents a year in the "scattered locations" to which the Legislatures referred (§1(6)). To ignore the problem any longer is to build up a situation where more and more shippers with a choice of ports will decide to try another port for the next shipment and perhaps to give up using the Port of New York altogether. To expedite this processing is to make for an efficient port just as truly do modern piers.

What we are judging, then, is a modern port facility to keep pace with the needs of the two States' great port in its continuing and urgent effort to attract and maintain its proper share

of world commerce.

The reasoning which has always impelled Courts to recognize port facilities as a public use applies with full strength to the World Trade Center, a port facility for which the two States have now found a vital public need.

If the question is asked how far the Legislatures may go in providing new port facilities in meeting their duty to preserve the Port, this Court has already answered in upholding port facilities as a public use:

> " . . . The only standard by which to judge of the extent of the duty consists in the necessities of the business. If a permanent pier and an exclusive right to its use be a necessity of those large steamship lines, without which business cannot be properly transacted, and in the absence of which steamers will be sent across the river to New Jersey or to some other port, then the duty rests with the state or municipality to furnish such quarters for a fair compensation or else the state is bound to permit the steamship companies to obtain such accommodations from private owners. Having undertaken the duty imposed upon it by the state to provide such accommodations as the interests of commerce fairly require, all appropriate acts by the city done in the performance of that duty are for a public purpose." *Matter of Mayor of the City of*

New York, 135 N.Y. 253, 263 (1892). (Emphasis added.)

By this Court's "standard by which to judge of the extent of the duty" the "necessities" of today dictate a holding that the basic World Trade Center concept is directed to the identical public purpose of providing adequate cargo handling facilities. Many other cases uniformly hold that the improvement of a port is a public use.[1]

We cannot emphasize too strongly that the basic World Trade Center concept is not only to provide "accommodation" of the port community, but its centralization.

The Respondents have utterly missed this distinction when they dismiss the legislative purpose as merely an attempt to take their property for the use of some customs broker who would lease space in the World Trade Center. The two states have no interest in merely accommodating this customs broker.

[1] The application of this doctrine to The Port of New York Authority appears in *Port of New York Authority v. City of Newark*, 20 N.J. 386 (1956); *Commissioner v. Ten Eyck*, 76 F.2d 515, 518 (1935); *cf. Commissioner v. Shamberg's Estate*, 144

The facility contemplated is not for him or any of its tenants as such. It is to achieve the advantages to all the public of centralizing his services and the services of his counterparts and all of the other port administrative services to the end of providing an efficient port capable of survival and growth.

The States can expect that each customs broker, just like each bus line in a public union terminal will, in time, recognize that the centralized facility is the place in which the public will expect to find that type of service. It is not the tenant's purpose which is being served, but the purpose of the State itself.

Furthermore, the basic tenants are govern-mental agencies and public utilities and other businesses affected with a public interest. Steamship lines and airlines are common carriers; freight forwarders are also common carriers under the Interstate Commerce, Shipping and Federal Aviation Acts;[2] and

F.2d 998, 1005 (2 Cir. 1944); *cert. den.*, 323 U.S. 792 (1944).

[2] 49 U.S.C. §1002(a) (5) ; 46 U.S.C. §841 ; 46 C.F.R. §510.2; 49 U.S.C. 425; 14 C.F.R. §296.2.

customs brokers are for the most part freight forwarders and therefore common carriers and are, in any event, engaged in a highly regulated business related to freight carriage and affected with a public interest.[3] While the centralization function does not stop with this nucleus, it does not extend beyond the port community. But, as we have seen in Point I, the Act delineates the hallmarks of the basic concept which permit judges in future condemnation cases to measure whether the statutory power or the constitutional test of public use have been exceeded.

The Legislatures certainly intended to centralize in the World Trade Center not only all of the back-up services of the Port but also to include "a central locale for exhibiting and otherwise promoting the exchange and buying and selling of commodities, and property in world trade and commerce, [which] will materially assist in preserving for the two States and the people thereof the material and other benefits of a prosperous

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[3] 19 U.S.C. §1641; 19 C.F.R. §31. See *Union Broker-age Co. v. Jensen*, 322 U. S. 202 (1943) for a description of customs bro-

port community." §l(7).

Government studies indicate that the bulk of export trade of the United States is done by less than 5 of all manufacturing firms and accounts for only about 4% of the Gross National Product. One of the reasons for these small percentages is the relative difficulty which any American firm faces in entering foreign markets. These markets are distant, there are cultural and language barriers, there are monetary problems and legal problems and monumental problems of red tape. Reciprocal problems face the potential foreign customer coming here to buy in the American market and the foreign merchant coming here to sell.

One of the purposes of the World Trade Center is to provide services that can minimize these barriers.

First of all, the overseas importer or exporter arriving in New York would not have to search around the commercial labyrinth of Manhattan to seek out assistance. He would know

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kers' services and regulation.

before-hand that the World Trade Center had an in-formation service which could supply him with names of suppliers and other international contacts, arrange introductions and smooth his way. He would know that there existed in the Center a World Trade Institute that would provide him with multi-lingual secretarial service, a library with research facilities and space for conferences on world trade.

The American exporter would, of course, maintain headquarters for the exhibition of his goods and negotiation with his prospective foreign customer. Permanent exhibition space for goods offered in world trade by both American and foreign manufacturers would be available in much the manner of a permanent public world's fair.

The World Trade Center would offer prospective importers and exporters from both here and abroad a one-stop facility. It would make it possible for an individual to complete an import and export transaction entirely within its walls, commencing with viewing the exhibited commodities and ending

with the administrative services. This means a business man on buying trips from Great Britain, Israel, Brazil, India or any other nation would be able to conclude his transaction in one, or, at the most, several days.

Other ports have begun to recognize the need. A public world trade center exists in San Francisco. A public world trade center exists in Houston. Florida has not only authorized a public world trade center in Miami, but its highest Court has approved it as a public purpose.

On June 20, 1962, the Supreme Court of Florida upheld the public purpose of the Inter-American Cultural and Trade Center to be provided under various Florida statutes by an Authority which is denominated a public corporation and agency of the State of Florida. *State v. Inter-American Center Authority*, 143 So. 2d 1 (Sup. Ct. Fla., 1962). The determination of public purpose was made in various connections, principal among which was the state constitutional provision prohibiting use of public funds primarily for the benefit of private parties.

The nature of the proposed Center was explained more fully in a 1955 opinion of the Florida Supreme Court which is followed in the 1962 opinion. *State v. Inter-American. Center Authority*, 84 So. 2d 9 (Sup. Ct. Fla., 1955).

The Court quoted and adopted the report of the Authority's consultants that "the functional purpose of the proposed Center is to increase trade and strengthen cultural relations among the nations of the Western Hemisphere. This objective is to be accomplished mainly through industrial, commercial, educational and cultural exhibits of countries of the Western Hemisphere and other nations." The Court rejected as inapplicable its own prior decision holding that it did not constitute a public use to acquire land for the purpose of leasing it solely for industrial development by private developers.[4]

[4] This best distinguishes the industrial development cases Respondents cited below, like *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P. 2d 171 (1959), to disestablish the public use of the present World Trade Center. The various States have split on the question of industrial development as a public use. In New York certain property may be taken to establish an industrial development for blight prevention. *Cannata v.*

New York, even with its relative decline, is still the leading port and. therefore, still has the greatest opportunity to employ the traditional concept of a permanent public fair or market place for world trade to enhance its position. Most of the overseas prospective buyers will reach the Port of New York first. The idea is to meet all their needs in this Port and to attract them to ship through it.

The provision of this centralized accommodation of a permanent market place with exhibition and related facilities for goods moving in world trade clearly fits the public purpose tests of the cases dealing with public fairs and markets.

In dealing with the 1939 World's Fair, the Court affirmed, without opinion. an Appellate Division decision which cited *Bush Terminal Co. v. City of New York* in rejecting a me-

City of New York, 11 N.Y.2d 210 (1962), app. dism. 371 U.S. 4 (1962).

chanics lien on World's Fair property. *John Kennedy & Co. Inc. v. New York World's Fair 1939 Inc.*, 288 N.Y. 494 (1940). The Second Department said 260 App. Div. 386, 389 (1940):

> "It would seem that under the authorities, the World's Fair is of such a nature that it is a 'public purpose.' The Fair has the sponsorship, in different degrees, of the city, State and Federal Governments. It includes exhibits of art, science, business, states and nations, and educational and recreational facilities. . . . any surplus resulting is to be turned over to the city and the State for public purposes."

The World Trade Center, as a facility intended to provide a permanent benefit to the entire economy and not just a temporary stimulus and edification presents an *a fortiori* example of a public purpose.

The Coliseum on Columbus Circle in New York City is a public exhibit hall, owned by the Triborough Bridge & Tunnel Authority. The site was condemned for slum removal purposes. In *Kaskel v.* Impellitteri, 306 N. Y. 73 (1933). Judges Van Voorhis and Fuld, while dissenting from the majority holding that the site was properly taken for slum removal, nevertheless concluded in a dictum that the Coliseum is for a "public purpose." (p. S5)

A public fair with provision for exhibits and exhibition facilities is hardly a new idea in this State. A State Fair was called for by Ch. 346, Laws of New York 1900 and it is today a duty of the State Department of Agriculture and Markets to hold such a State Fair annually. Agriculture and Markets Law §16 (28); §31. Since Ch. 870, Laws of New York 1939, this State has had an Industrial Exhibit Authority for "a state or interstate or international industrial exhibition in connection and cooperation with the annual state fair." Public Authorities Law §§1653-4.

Public markets similarly have a traditional acceptance as a public use in this State. Their history, going back to 1686, was traced in *Matter of Cooper*, 28 Hun 515 (1883), app. dism. 93 N.Y. 507 (1853). The philosophy of the 1962 Legislatures is not better expressed than in this 1883 Court decision. At page 525 the Court said:

> . . The learned counsel for the appellant, ... seems to think that because all persons for the sale of commodities would not be admitted to the market, it is not a public market for a public use. But this is a grave error. It is a market for the concentration of a particular kind of produce, a centralization of it so to speak, and a benefit to the public, who know that in a particular locality they can find the articles designated to be sold there."

Times have changed, the problem is greater, the solution requires a greater effort and the subject of the fair and market place under inquiry is the more significant one of world trade rather than local produce. The public purpose persists. It has already been so held for an International Trade Mart in Miami, *State v. City of Miami,* 76 So.2d 294, 297 (Sup. Ct. Fla.. 1954).

Here the public purpose is fortified because it joins together the public purposes of port preservation and development, public markets and public fairs.

(6) The effectiveness and wisdom of the remedy are for legislative determination.

While it is true, of course, that the question of public

use is ultimately a judicial one, controlling weight is normally given to legislative and gubernatorial findings and conclusions such as those in the present case. In fact, the United States Supreme Court has said:

> " . . . when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature not the judiciary, is the main guardian of the public needs . . . *Berman. v. Parker*, 348 U. S. 26, 32 (1954) (Emphasis added.)

The 1962 Act itself contains extensive declarations, findings, and conclusions of the two States all of which establish that effectuation of the World Trade Center will constitute a governmental and public use within the meaning of our state and federal Constitutions. Typically, §10 recites the States' agreement that effectuation of both the World Trade Center and the Hudson Tubes railroad:

> " . . . will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be re-

garded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto."

The Legislatures determined that the effectuation of the project

> " . . . by the port authority has the single object of preserving, and is part of a unified plan to aid in the preservation of, the economic well-being of the northern New Jersey-New York metropolitan area and is found and determined to be in the public interest." (§1 (9))

Section 14 declares that property required for the purposes of the Act is "required for a public use."

The Senate Commerce Committee Report (No. 744, 1961) on the proposed United States Foreign Commerce Act declares (p. 10) :

> " . . . there has been expressed a need for permanent exhibits of our products both overseas and in the United States. The Department of Commerce has already made a start in this direction by opening its center in London. *The plan of the Port of New York Authority to establish a permanent trade center in our Nation's largest city is, similarly, an admirable project.* The Department of Commerce should take an active lead in fostering such centers, and in encouraging our manufacturers to exhibit their products in such permanent trade fairs." (Emphasis added.)

There is nothing to the Respondents' suggestion that the States have any burden to prove to the Court's satisfaction that the World Trade Center will in fact halt the decline of the Port's relative economic position. This Court has said

> " 'Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature' . . . . In other words, was the legislative choice without rational basis?" *Lincoln. Bldg. Associates v. Barr.* 1 N.Y.2d 413, 415, 418 (1956).

The Legislatures recited their belief that realization of their purpose "will materially assist in preserving for the two states and the people thereof the material and other benefits of a prosperous port community." (§1 (7)) The Governor, in his message of approval, said that "The Center will be an essential and effective factor in attracting and retaining for the Port of New York its proper share of world commerce." (McK. Sess. Laws 1962, p. 3613).

We recognize, of course, that the Court is not abso-

lutely bound by these legislative findings. But they cannot be rebutted merely by the Respondents' questioning whether the legislative remedy of a World Trade Center is wise and will actually work to correct the existing evil. Certainly as this Court said in *People v. Nebbia, 262* N. Y. 259, 265 (1933) :

> "The legislative declaration of facts ... was entitled to great respect and was confirmed by common knowledge."

This Court's holding was affirmed by the United States Supreme Court which said:

> "The legislature is primarily the judge of the necessity of such an enactment . . . ." 291 U. S. 502, 537-8 (1934).

The same rule was clearly set forth by Chief Judge Lehman in upholding mortgage moratorium legislation in *East New York Savings Bank v. Hahn,* 293 N. Y. 622, 627 (1944), *aff'd,* 326 U. S. 230 (1945):

> " ... the legislative findings are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established."

In *Lincoln Bldg. Associates v. Barr,* 1 N.Y.2d 413, 415

(1956), this Court said that:

> "A legislative enactment carries with it a strong presumption of constitutionality, i.e., it is presumed to be supported by facts known to the Legislature.
>
> * * *
>
> "Nor may courts substitute their judgment for that of the Legislature so long as there can be discovered 'any state of facts either known *or which could reasonably be assumed"* to afford support of the legislative decision to act." (Emphasis added.)

See also *DeVeau v. Braisted.* 5 N.Y.2d 236, 241-2 (1959), aff'd.363 U.S. 144 (1960).

Remembering that the Act cannot be invalidated unless there are no "facts either known or which could reasonably be assumed" and unless the determination is "without rational basis," how can the Legislatures be called irrational in making the determinations underlying this Act? By the same token, the public use cannot be destroyed because of the architectural treatment of the structures to accommodate the functions, activities or services to be centrally accommodated. Whether one tall building will serve the public use better than two low fiat

buildings is an administrative determination of detail, without constitutional significance.

(7) The appropriateness of a public agency to administer the program.

The States have found that the Port Authority "is the proper agency to act in their behalf" to effectuate this public facility. (§1(8))[5]

The basic reason, as reported to the Legislatures, is that a private company must have the objective of maximum profit and derive a maxi-mum economic return on its investment in every square foot of land and structure. The World Trade Center concept cannot possibly be accomplished with such an approach.

To begin with, the United States Government requires hundreds of thousands of square feet of expensive land and structures in the Center to accommodate its customs space. The

[5] It is legally immaterial, of course, whether or not only a public agency could accomplish this public purpose, Cf. *New York City Housing Authority v. Muller*, 270 N.Y. 333 (1936); *Cannata v. City of New York*, 11 N.Y.2d 210 (1962), *app. dism.*, 371 U.S. 4 (1962).

Federal Government has obvious economic advantages in constructing its own accommodations which no private developer enjoys. The Government therefore would not expect to pay over the years as much rent as an ordinary private business would pay for the same space. A public agency like the Port Authority can narrow the gap between a private developer's cost base and the theoretical cost base of the Federal Government itself. It can do so even within the confines of its statutory and contractual responsibilities to support its own facilities without burden to the taxpayers.

Furthermore, the whole concept of the World Trade Center is to centralize as many tenants of the world trade community as possible, even though their individual space requirements may not be large. A private developer procures maximum economic advantage by having as few ten-ants as possible with large individual holdings, instead of a multitude of smaller tenancies. Again, the World Trade Information Service could be

provided only by a public agency because it cannot be expected to furnish a substantial financial return and would simply be a wasteful use of equivalent space in private ownership.

Finally, on the most optimistic cost estimates, the World Trade Center would be in the red for years. We reported to the Legislatures that we would expect that it would not become self-supporting until the tenth year after the commencement of its construction. Perhaps private investors can be found who would willingly assume a ten year moratorium on any return and would contribute in addition to their original investment operating and debt service losses that would be incurred over a decade, all in the expectation of a fairly meager return judged by the standards of the private investment market. We doubt it and the Legislatures doubted it, and they were not willing to wait any more than they were willing to wait for slum clearance or urban renewal to be accomplished exclusively by private developers looking for profit alone.

(8) The World Trade Center is no less a public use because space therein would be leased to public and private tenants.

Respondents contend that condemnation for World Trade Center purposes would not be for a public use since the Act contemplates the leasing of space to the persons who would be centrally accommodated. Respondents therefore characterize the facility as only a "real estate business."

Respondents' assertion is almost identical to that made and rejected in *Bush Terminal Co. et al. v. City of New York*, 282 N. Y. 306 (1940). There as here, it was contended :

> "The Port Authority is purely and simply the landlord. Similar space for the institution of an Inland terminal by the carriers jointly might well be arranged with the owner, for instance, of the Chrysler Building or the Empire State Building or of any other building within the City of New York." (Appellants' Brief in *Bush*, p. *32)*.

In *Bush*, as in the present case, the leasing of the facility by the Port Authority was the very public purpose which the Legislature had authorized the Port Authority to effectuate.

The New Jersey Supreme Court has recently expressly

stated that a study of the *Bush* opinion "leads us to accept its basic principle," although it found the building in question taxable under the particular statutory definition. *Borough of Moonachie v. Port of New York Authority.* 38 N. J. 414 (1962).

In *Matter of Mayor of the City of New York, supra,* this Court sustained the condemnation of land for marine terminal improvements against a challenge that, because the City intended to lease them to private companies for exclusive use, the taking was not for a public use. This Court said (135 N. Y. at pp. 263-4) :

> "Land which is thus taken is taken for a public use, although some portion of all the land actually used may be thereafter in the discretion of the city, divided off and placed in the exclusive possession of a lessee for the sole purpose of using it in the trans-action of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers."

This Court has said:

> "The modern city functions in the public interest as proprietor and operator of many activities formerly and in some instances still carried on by private enterprise." *New Fork City Housing*

> *Authority v. Muller, supra,* 270 N Y. 333, 342 (1936).
>
> See also *Berman v. Parker.* 348 U.S. 26, 33-4 (1954).

To this day almost all New York City and Port Authority piers are leased for the exclusive use of individual private companies. Public airports, public markets, public bus and truck terminals, public fairs and public housing almost universally include space and structures leased to private persons for their exclusive use.

We know that in asking the Court to appraise the basic World Trade Center concept we bear the burden of the fact that a World Trade Center may look like an ordinary private office building, such as a real estate venturer might build. By the same token, a public housing facility looks exactly like a private apartment house. And the State Office Building in Albany looks like a private office building. So does the Port Authority's Inland Terminal Building, upheld by this Court in *Bush Terminal Co. v. City of New York,* 282 N. Y. 306 (1940), *supra.* Public purpose is not destroyed by such external similarities.

Respondents habitually make a related statement—that the World Trade Center has no other purpose than to produce surpluses to offset the anticipated deficits of the Hudson Tubes. This is simply not true and there is not a word in the record which supports it. If the suggestion is that the Port Authority has a secret intent to exceed the legislative authorization then, aside from the falsity of the charge, it is utterly immaterial at this point in judging the constitutionality of the legislative determination. If it is meant that the Legislatures had an ulterior motive in authorizing a facility which is properly classed as a public purpose, then, aside from its falsity, it should be observed that the motive of the Legislatures is legally immaterial. As stated in *New Orleans v. Warner*, 175 U. S. 120, 145 (1899), "from the case of Fletcher v. Peck to the present time, we have uniformly refused to in-quire into the motives of legislative bodies."

If such unsupported and false accusations are to be allowed to raise questions as to the constitutionality of the statute,

then the presumption of constitutionality has been repudiated. "While this presumption is rebuttable, unconstitutionality must be demonstrated *beyond a reasonable doubt.*" *Wiggins v. Town of Somers*. 4 N. Y. 2d 215, 218 (1958). (Emphasis added.) When the Legislature makes a finding and lists the statute's objectives, "mere disagreement may not cast doubt on the statute's validity." *New York State Thruway Authority v. Ashley*, 10 N.Y. 2d 151, 156 (1961).

(9) While the concept of public use is expanding to meet the public need, the World Trade Center meets the most traditional test of a public use.

Our Courts have always held that the concept of public use tends to be co-extensive with the public need in changing times to meet current public problems which can only be met effectively by use of the eminent domain power. *New York City Housing Authority v. Muller*, 270 N.Y. 133, 340 (1936).

The most recent and authoritative discussion of the problem is the recent decision of the Court of Appeals in *Cannata v. City of New York*, 11 N. Y. 2d 210 (1962), app. dism.

371 U. S. 4 (1962). That case concerned the constitutionality of a statute authorizing New York City to condemn predominantly vacant property for sale to private industrial developers if the property would merely "tend to arrest the sound growth of the community" even though the property was itself "without tangible physical blight" and might not even "tend to create slums and blight areas."

In that case the owners of homes which were neither substandard nor unsanitary sought a declaratory judgment that the act was unconstitutional as applied to them. Chief Judge Desmond writing for the Court said that

> "an area does not have to be a 'slum' to make its redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings." (p. 215)

We cite *Cannata* at this point not because we rest our claim on slum clearance or urban renew-al grounds.[6] We cite it

[6] The present Act (§7) would permit the Port Author-ity, for World Trade Center purposes, to cooperate with the City of New York, if the City selected the Hudson Tubes-World Trade Center area for urban renewal purposes. In view of the substandard, deteriorated condition of the area the urban renewal approach to land acquisition will receive active consideration. If the statutory standards are met condemnation of this area for the conceded public purpose of urban renewal would, of course be beyond challenge on constitutional grounds. *Kaskel v. Impellitteri*, 306 N. Y. 73 (1953).

because it is the latest case on the law of public use and reflects acceptance of a public use concept much broader than is required to encompass the World Trade Center.

In *Cannata*, unlike this case, the property taken did not end up in public ownership but was sold outright to private persons. There no facility resulted, to continue to operate in the public service, but rather an "industrial park" of private factories. And none of the occupants were, in *Cannata* governmental agencies nor public utilities, whereas the principal occupants of the World Trade Center would be Federal, State, local and foreign governmental agencies and common carriers and other regulated businesses affected with a public interest.

In *Cannata* the determination and selection of site limits was not even made by the Legislature itself, as in this case,

but under delegated authority to local agencies with only a set of standards to govern the delegation.

The trend of the cases in this State, culminating in the *Cannata* case, has been an ever broadening view of what constitutes a public use for which property may be taken by a public agency.

In this case, however, we are not asking the Court to advance the public use concept. Our principal cases are an 1883 case announcing that public markets constitute a public use *(Matter of Cooper, 28* Hun 515, app. dism. 93 N.Y. 507). and an 1892 case which said that it was a public use to accommodate the necessities of oceanborne commerce using the Port of New York *(Matter of Mayor.* 135 N. Y. 253). In both these cases, the City was to be a landlord and, we suppose, was a "real estate venturer" in one sense of the term. But in both, this Court discerned the true public purpose, ignored the surface similarity to private operations and permitted the Legislature to discharge its responsibility to promote the general welfare.